

Commentary of the Standing Advisory Committee on the Rules of Civil and Appellate Procedure on S.J.C. Rule 1:24

This Commentary was drafted by the Supreme Judicial Court's Standing Advisory Committee on the Rules of Civil and Appellate Procedure, which recommended the adoption of this Rule. The Court's Standing Advisory Committee on the Rules of Criminal Procedure furnished helpful input on Section 6 and the Commentary thereto. The Commentary does not constitute part of the Rule and has not been formally adopted by the Court but is provided as an aid to understanding and applying the Rule.

Section 1

This rule applies to paper documents, as well as to electronic documents that are now or may in the future be filed with or issued by all Departments of the Trial Court; the Appeals Court; and the Supreme Judicial Court. The rule does not govern the separate question whether various court documents should be made publicly available on the Internet.

The reference in Section 1 to "greater obligations imposed by the law or court" is intended to include statutes and rules that require, or authorize a court to require, impoundment or confidentiality, however labeled. *See, e.g.*, G.L. c. 265, § 24C (requiring that court records containing rape victims' names be "withheld from the public"); G.L. c. 6, § 178M (on judicial review of Sex Offender Registry Board decisions, records to be kept "confidential and . . . impounded"); G.L. c. 209A, § 8 (requiring that certain personal information filed in connection with requests for abuse prevention orders be "withheld from public inspection except by order of the court"); Mass. R. App. P. 16(m) (governing "references to impounded material"). Litigants should also be aware that other court rules, such as the forthcoming Uniform Rules on Access to Court Records (Trial Court Rule XIV), may impose limits on whether or how certain personal information may be included in court filings.

Section 2

The term "filer" as used in Section 2 and throughout this rule includes any person or governmental or other entity making a filing (including, *e.g.*, persons applying for criminal complaints, police officers applying for search warrants, putative interveners, and amici curiae) regardless of their status as parties.

In the definition of "Personal identifying information," the term "financial account numbers" includes, but is not limited to, insurance policies, and account numbers and loan numbers assigned by financial service providers.

Section 3

Section 3 refers to "filing" documents in court. Exhibits offered at evidentiary hearings, although not "filed" as that term is used in Mass. R. Civ. P. 5 or Mass. R. Crim. P. 32, are subject to this rule. Prior to trial or other evidentiary hearing, the parties should discuss how to handle

exhibits in compliance with this rule, as well as any issues of waiver of the rule's protection pursuant to Section 8.

Section 4

In the case of documents drafted for filing in court as described in Section 4(a) (*e.g.*, motions, memoranda, and affidavits, as opposed to pre-existing exhibits), this rule does not require the filer to prepare a second version with complete personal identifiers. Nothing in this rule limits the court's power to order that such complete information be supplied to other parties or non-parties.

The provision in Section 4(b) requiring the filer to mark redactions creates a record that helps protect against claims of improper alteration of documents. Particularly in documents with multiple redactions, the required notation of each redaction need be no more than an asterisk or similar mark, together with a single statement, on or accompanying the document, explaining that redactions so marked were made by the filer on a specified date.

Section 5

The exception in Section 5(a) does not permit inclusion of complete personal identifying information in a filing merely because such information may be useful to include in an order to be issued in the proceeding as requested by the filing. Alternatives are often available.

Thus, a motion for an order to a third party to produce records, such as a person's hospital records under G.L. c. 233, § 79, or a person's criminal offender record information (CORI), shall not include the person's unredacted personal identifying information. The motion and any resulting order may instead include redacted information, and the moving party may then, at the time the order is served on the entity required to respond to it, provide any unredacted information the entity requires in order to respond.

Similarly, a filer shall not include bank or other asset account numbers in court filings in connection with court orders that serve to secure assets to satisfy a judgment. If complete account numbers are necessary, the filer (usually the plaintiff) may provide this information separately, along with any other unredacted personal identifying information necessary to identify an account holder, to those who may need it to carry out the order.

Likewise, a bank responding to a trustee summons shall not include the entire account number in the trustee's answer. Section 1 and Section 9 recognize that courts and filers retain flexibility to deal with such situations without unnecessarily making personal identifying information publicly accessible.

The exception in Section 5(b) for transcripts is included to avoid undue burden on the court reporter or transcriber. Section 5(b) also creates an exception for the official record of another court proceeding, filed by that court, *e.g.*, in a certiorari action under G.L. c. 249, § 4, for review of a District Court or Boston Municipal Court decision. Ordinarily the documents in that record will already have been redacted in accordance with this Rule, either by the parties at the

time of filing or by the court at the time of issuance. This provision of Section 5(b) makes clear that the court need not independently review all of those documents to ensure that they were properly redacted.

The exception in Section 5(c) recognizes that departments of the Trial Court or the appellate courts may adopt their own rules or standing orders governing redaction of personal identifying information in the official record of an administrative adjudicatory proceeding filed by the administrative agency. This provision is included to afford flexibility to the courts in dealing with the particular redaction problems raised by the filing of these often voluminous records. The term “adjudicatory proceedings” refers to proceedings that are judicially reviewed primarily or exclusively on the agency record, under G.L. c. 30A or other law such as G.L. c. 249, § 4. The qualifier “adjudicatory” is used because the reasons for different treatment of the records of such proceedings are less likely to apply to documents concerning other, less formal administrative proceedings.

The exception in Section 5(d) is intended to cover documents produced by a non-party pursuant to Mass. R. Civ. P. 45(b), Mass. R. Crim. P. 17(a)(2), Superior Court Rule 13 and G.L. c. 233, § 79 (hospital records), and similar court rules or laws. It is intended to be consistent with the *Dwyer* protocol applicable to defendants’ motions for Rule 17(a)(2) summonses. See *Commonwealth v. Dwyer*, 448 Mass. 122, 147-50 (2006). The exception recognizes that requiring the non-party to redact, particularly where some or all of the records may never become available to the public, would be unduly burdensome.

Section 6

This section is based, with some Massachusetts-specific alterations, on Fed. R. Crim. P. 49.1(b)(7)-(9). This section addresses special considerations related to charging documents and documents created by police or other investigative entities prior to the initiation of a criminal case. Requiring redaction of such documents would impose a substantial burden on these law enforcement agencies, which necessarily must document the personal identifying information relied upon for investigative purposes. Moreover, requiring redaction of these documents would deprive clerks initiating a new criminal case or issuing an arrest warrant of the information necessary to properly identify the defendant and enter the case or warrant into, and search for existing information about the defendant already contained in, databases such as MassCourts and the warrant management system. This is necessary to ensure, among other things, that information about prior cases or warrants involving that defendant is available to the court in the pending matter, and that information about the pending matter is available to the court in any future cases involving that defendant.

Unlike the federal rule, however, Section 6 does ordinarily require redaction when one of these documents is filed by an attorney as an exhibit in another case. Thus, an attorney might need to file a search warrant, District Court charging document, or police report attached to an application for a criminal complaint, as an attachment to a motion to dismiss or suppress, or an opposition thereto, in a related Superior Court case. In that circumstance, there would be no burden on the investigative agency or need for the Superior Court clerk to have access to that information. The attorney, therefore, would be required to redact the document of personal

identifying information. If that document, however, already appeared in the same court file (for example, an application for complaint attached to a District Court motion to dismiss), there would be no point in redacting the document when filed as an exhibit, and an attorney would not need to do so.

In any event, the court may make other orders regarding the redaction of documents in a criminal case file, if a different practice is warranted in a particular case.

Section 7

This section makes clear that clerks are not responsible for reviewing every filed document for compliance, but it does not preclude clerks from reviewing selected documents for compliance—for example, at the time a member of the public asks to see a case file.

Section 8

In determining issues concerning corrective action, the court has the discretion to consider all relevant circumstances, including but not limited to whether the violation of this rule was willful or repeated, whether it has caused or is likely to cause harm to privacy interests or financial interests, and the nature and amount of information improperly filed in unredacted form.

Section 9

The exception in Section 9 for inclusion of complete personal identifying information where “necessary to serve the document's purpose” is included because some types of court documents, although directed to parties or non-parties that require specific identifying information, are included in the court file, where they are publicly accessible as a matter of law. Although the inclusion of personal identifying information should be minimized when drafting such documents, it must be recognized that sometimes, unredacted information will be necessary to serve the purpose of the document.

Section 10

Section 10(b)'s provision governing documents not redacted when filed in or issued by the trial court is included because the rationales underlying the exceptions in Sections 5 and 6 ordinarily would not apply, and would not serve any useful purpose if applied, to documents presented to the appellate court in the record appendix. If inclusion of an unredacted document is warranted, Section 10(b) allows the party to do so if leave of the appellate court is obtained.